SUPREME COURT, U.S.
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MICHAEL RODAK, JR.

No. 73-806

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30–101)[1] is reported at 482 F.2d 672. The opinion of the district court (Pet. App. 16–29) is reported at 340 F. Supp. 1343.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30) was entered on June 27, 1973, and rehearing

[1] "Pet App." refers to the appendix to the petition for a writ of certiorari; "App" refers to the appendix in the court of appeals.

was denied on August 6, 1973 (Pet. App. 104). On October 26, 1973, the Chief Justice extended the time in which to file a petition for a writ of certiorari to November 20, 1973. The petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the rulemaking power in Section 6(g) of the Federal Trade Commission Act authorizes the Federal Trade Commission to issue rules defining unfair and deceptive trade practices made unlawful by Section 5 of the Act.

STATUTE AND REGULATION INVOLVED

Sections 5 and 6 of the Federal Trade Commission Act, 38 Stat. 719, 721, as amended (15 U.S.C. 45 and 46) and the Federal Trade Commission Octane Posting Trade Regulation Rule (16 C.F.R., Part 422, 36 Fed. Reg. 23871) are set forth in pertinent part at Pet. App. 1–15.

STATEMENT

Petitioners (two trade associations and thirty-four oil refining companies) seek review of a unanimous decision of the court of appeals (Pet. App. 30–101) that the Organic Act of the Federal Trade Commission authorizes it to promulgate rules defining unfair trade practices for the purpose of Section 5. As the court of appeals noted, after promulgation "the rules would be used by the agency in adjudicatory proceedings aimed at producing cease and desist orders

against violations of the statutory standard" of sections (Pet. App. 31).

1. *Proceedings Below.*—On July 30, 1969, the Commission proposed a trade regulation rule declaring that the failure to post octane numbers on gasoline pumps at service stations would be an "unfair method of competition" and a deceptive practice within the meaning of Section 5 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. 45. 34 Fed. Reg. 12449. The Commission invited interested persons to submit their views orally or in writing and conducted hearings pursuant to its Procedures and Rules of Practice (16 C.F.R. 1.16) and Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. All submissions were entered in the public record and responsive comments were also received.

After reviewing all comments, the Commission issued an altered proposed Octane Posting Rule on December 30, 1970. 36 Fed. Reg. 354. To provide affected companies time to prepare for compliance, the rule was made effective six months later. Prior to the effective date, the Commission was advised in writing by Texaco Inc. that the method which the Commission proposed to determine octane ratings might not be fully reliable. Thereafter, the Commission reopened the record to reconsider that portion of the Rule relating to rating of octane. 36 Fed. Reg. 7309. After receiving additional comments, the Commission proposed a modified Octane Posting Rule requiring that an average laboratory octane number be posted

on gasoline pumps; further comments were invited. 36 Fed. Reg. 16120.

On December 16, 1971, the Commission adopted the revised Octane Posting Rule in issue here, to become effective March 15, 1972 (36 Fed. Reg. 23871), together with a fifty-eight page Statement of Basis and Purpose. 36 Fed. Reg. 23871. [2]

While the Commission was still considering the rule, petitioners filed a complaint for declaratory judgment and injunctive relief, challenging the rule and the authority of the Commission to issue it. [3]

The matter was submitted to the district court on cross-motions for summary judgment (App. 61–62, 87–88). The district court held that the Commission does not have authority to issue substantive trade regulation rules. The court concluded that the legislative history of the Act, as well as the context of the Act's grant of rulemaking power to the Commission in Section 6(g) (15 U.S.C. 46(g)), demonstrated that only procedural, not substantive, rulemaking authority was conferred (Pet. App. 19). Having so concluded, the district court did not reach the petitioners' challenges to the reasonableness of the rule and to the procedures employed by the Commission in promulgating it.

[2] The effective date of the Octane Posting Rule was suspended by the district court and no new effective date has been set by the Commission.

[3] The suit was filed in the United States District Court for the Southern District of Texas (App. 1–28). That court granted the Commission's motion to transfer the case to the United States District Court for the District of Columbia (App. 29).

The court of appeals unanimously reversed, and remanded the matter to the district court for resolution of the remaining issues. In an extensive opinion (Pet. App. 30–77) supported by an appendix reviewing in detail the Act's legislative history (Pet. App. 78–101), the court of appeals held that the plain language of Section 6(g) conferred substantive rulemaking power on the Commission. It relied upon the construction which this Court had previously given other subsections of Section 6, and similar grants of rulemaking authority in other statutes. In light of the Commission's broad statutory mandate to prevent unfair and deceptive practices which may harm competition or consumers, the court of appeals rejected claims that the Commission's authority was solely prosecutorial in nature and that case-by-case adjudication was the exclusive means available to the Commission for defining conduct it deemed to violate Section 5.

While recognizing that the Act's legislative history did not clearly disclose Congress' specific intent respecting rulemaking, the court concluded that Congress' broad purpose in adopting the Act would be furthered by reading Section 6(g) to incorporate the benefits and advantages of the substantive rulemaking power. The court ruled that such a power does not "bypass the Commission's statute-based cease-and-desist proceedings. It merely supplements them" (Pet. App. 65–66). Finally, the court held that the agency's failure previously to exercise substantive rulemaking authority was not proof that it did not possess it.

ARGUMENT

The court of appeals correctly held that the Federal Trade Commission has authority to promulgate substantive rules defining particular activities that constitute unfair methods of competition and unfair or deceptive acts or practices. That holding is supported by both the language of the statute and its legislative history and accords with decisions of this Court recognizing the authority of other regulatory agencies to adopt substantive rules under comparable statutory provisions.[4] There is no occasion for further review.

1. As the court of appeals recognized, substantive rulemaking "is convincingly linked to the goals of agency expedition, efficiency, and certainty of regulatory standards that loomed in the background of

[4] The provisions of Section 6 of the Federal Trade Commission Act (15 U.S.C. 46), *inter alia*, are made applicable to the jurisdiction, powers and duties of the Secretary of Agriculture in enforcing the Packers and Stockyards Act of 1920 and similar legislation. 7 U.S.C. 222; 21 U.S.C. 467d, 677, 1051. But cf. 7 U.S.C. 228(a); 21 U.S.C. 463, 1043. Pursuant to his rulemaking authority the Secretary has from time to time issued rules which are regarded as advisory in nature, and in reviewing adjudicative actions taken by the Secretary, where a person was found to have violated the statute and a regulation, two courts of appeals have observed in dicta that the imposition of sanctions depends upon a violation of the statute as opposed to the regulation. See *United States* v. *Donahue Bros.*, 59 F. 2d 1019, 1022 (C.A. 8); *Fairbank* v. *Hardin*, 429 F. 2d 264, 269 (C.A. 9), certiorari denied, 400 U.S. 943. In neither case, however, did the court hold that the Secretary was not authorized to adopt substantive rules defining what he would regard as an act or practice in violation of the laws he was administering, and there is no conflict alleged between those decisions and the instant case.

the 1914 passage of the Federal Trade Commission Act" (Pet. App. 64).[5]

Section 5(a)(6) of the Federal Trade Commission Act (15 U.S.C. 45(a)(6)) directs the Commission to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." In framing the statutory standard broadly, Congress has charged the Commission with the responsibility of giving content and meaning to an otherwise "elusive"[6] standard. Congress declined to confine the Commission to a purely prosecutorial role by listing in the statute specific unfair practices. Instead, it cloaked the Commission with broad powers of investigation and enforcement so that it could effectively define the broad statutory standard and apply it to the myriad aspects of commercial transactions.[7]

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[5] See S. Rep. No. 597, 63d Cong., 2d Sess., pp. 5, 6, 8, 10, 12, 13, 22; H. Rep. No. 1142, 63d Cong., 2d Sess., p. 19.

[6] *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244.

[7] The Senate Committee on Interstate Commerce explained this decision:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others." (S. Rep. No. 597, *supra*, at p. 13.) The conference report confirms this view:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this

The 1938 Wheeler-Lea Amendment to Section 5 (52 Stat. 111) legislatively confirmed this Court's prior conclusion that the Act was not "intended to confine the forbidden methods to fixed and unyielding categories." *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310. The Act was intended to reach across the entire spectrum of commerce, protecting both competition and consumers from unfair and deceptive practice. *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244. For this broad statutory standard to be administered effectively, the powers assigned to the Commission throughout the Act must be read as an "integrated whole." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 650.

Section 6(g) of the Act (15 U.S.C. 46(g)) authorizes the Commission, without limitation, "to make rules and regulations for the purpose of carrying out the provisions of this Act." Utilizing the rulemaking authority of Section 6(g) to define and particularize the statutory standard not only simplifies and expedites enforcement of the Act, but also provides the Commission with a broad range of views to consider in formulating a standard. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201–203; *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764–765.

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field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." (H. Conf. Rep. No. 1142, *supra*, at p. 19.)

As enacted, Section 5 of the Act (15 U.S.C. 45) declared unlawful "unfair methods of competition in commerce * * *." (The prohibition of Section 5 has since been broadened to include "unfair or deceptive acts or practices." 52 Stat. 111.) Section 5 also empowered the Commission, by instituting adjudicatory proceedings resulting in issuance of an order to cease and desist from using such methods of competition, to prevent persons from engaging in such activities. As the court of appeals recognized (Pet. App. 34), Section 5 does not contain limiting language suggesting that case-by-case adjudication is the *only* method available to the Commission to elaborate and define the statutory standard of unfairness.

Trade regulation rules do not circumvent the adjudicative method of enforcement provided for in Section 5. Adjudicative proceedings are still required before a person may be subjected to sanctions for violation of the Act or a rule. Rather, the rules supplement the adjudicative method by providing a prior determination by the Commission of the essentially legal question whether a particular act covered by the rule constitutes an unfair method of competition or a practice proscribed by Section 5. Such a determination having been made by the Commission, on the basis of its informed judgment and expertise, the scope of inquiry is narrowed when the Commission conducts the specific enforcement proceedings under Section 5, without which the rule can have no ultimate legal effect.

Accordingly, because a rule defining an unfair practice or an unfair method of competition establishes only a legal standard and is not designed to determine whether any particular person in fact engaged in conduct that violated the rule and hence Section 5, it does not infringe any rights of a respondent in adjudicatory proceedings under Section 5. The respondent can still demonstrate that its conduct did not fall within the rule, or that changed conditions or other special circumstances warrant waiver of the rule as to it. See also p. 11, *infra*, n. 8.

In addition to their role in adjudicatory proceedings, moreover, trade regulation rules provide guidance to the business community with respect to specific unfair trade practices.

2. Contrary to petitioners' contention (Pet. 12), comparable exercises of rulemaking authority have often been upheld by this Court in decisions which recognize that an administrative agency like the Commission is not confined to the adjudicatory process in elaborating the contours of the statute it administers.[8] *Federal Power Commission* v. *Texaco,*

[8] Petitioners' contention is partially based on the erroneous view that the absence in the statute of specific procedures governing formulation of rules and judicial review of such rules indicates that adjudication is the only method available to define unfair practices or methods of competition. Other statutes which petitioners acknowledge to have provided the Commission and other agencies with substantive rule-making power (Pet. 12–13) likewise do not specify procedures for promulgation of such rules nor do they provide for judicial review of rule-making (as opposed to review of orders in adjudication). *E.g.*, Wool Products Labeling Act of 1939 (15 U.S.C. 68d(a)); Federal Power Act (16 U.S.C. 825h); Securities Act of 1933

Inc., 377 U.S. 33, 39; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192;* *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609. The standard for evaluating the exercise of an agency's rulemaking authority was restated only last term in *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 369:

> Where the empowering provision of a statute states simply that the agency may "make * * * such rules and regulations as may be necessary to carry out the provisions of the Act" we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280–

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and other laws administered by the Securities and Exchange Commission (15 U.S.C. 77s(a), 77sss(a), 78w(a), 79t(a), 80a–37, 80b–11); Communications Act of 1934 (47 U.S.C. 303(r)); National Labor Relations Act of 1935 (29 U.S.C. 156); Civil Aeronautics Act of 1938 (49 U.S.C. 1324(a)). All of these enactments, like Section 6(g), antedated the Administrative Procedure Act of 1946 (5 U.S.C. 553, 701) which now provides generally applicable procedures for promulgation and judicial review of agency rules. Accordingly, in promulgating substantive rules pursuant to Section 6(g), the Commission now must comply with the procedures specified in that Act, and the rules adopted are subject to judicial review thereunder (*e.g.*, as to whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706 (2)(A)). Such judicial review can occur in a direct challenge to the validity of the rule prior to its enforcement (*Abbott Labs.* v. *Gardner*, 387 U.S. 136, 139–141), or in the context of court of appeals review of an order to cease and desist issued by the Commission on the basis of a person's violation of the rule and hence Section 5. See 15 U.S.C. 45(c); cf. 5 U.S.C. 703.

*Rulemaking was upheld in *Storer*, *supra*, as necessary to the "orderly conduct of * * * [Federal Communications Com-

281 (1969). See also *American Trucking Association* v. *United States*, 344 U.S. 298 (1953) [footnotes omitted].

3. That the Commission's rulemaking authority is an integral part of, and may be used to implement, the agency's enforcement powers under Section 5 is demonstrated by the broad language of Section 6(g) and this Court's construction of Section 6 in *United States* v. *Morton Salt Co., supra.* There, in holding that the Commission could use the additional powers granted to it by Section 6 to aid in the implementation of the enforcement powers conferred by Section 5 (338 U.S. at 647–651), this Court specifically rejected the contention—also made by petitioners here—that the Commission's authority under Section 5 was "self-contained and sealed off" from its authority under Section 6. *Id.* at 649. Whether or not the interaction between Section 6(g) and the broad standards of Section 5 was ever specifically considered by Congress, there is nothing to suggest that the draftsmen sought to withhold from the Commission the power to give meaning to and to particularize, through rulemaking, the concept of unfair methods of competition.

During the legislative debates the issue of substantive rulemaking was subsumed within the broader question as to whether the Commission should have

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mission] business." 351 U.S. at 202. Moreover, to deny administrative agencies the opportunity to fill in the interstices of their acts through rulemaking (*Securities & Exchange Commission* v. *Chenery Corp.*, *supra*, 332 U.S. at 202) would undermine the "flexibility sought in vesting broad rulemaking authority in an administrative agency." *Mourning* v. *Family Publications Serv., Inc.*, *supra*, 411 U.S. at 372.

any independent enforcement authority at all. The bill passed by the House provided for a Commission with the investigatorial authority eventually provided in Section 6 but did not prohibit or declare unlawful any conduct, and hence did not grant the Commission power to enforce the Act through adjudicatory proceedings directed against particular violators. The House bill did, however, authorize the Commission "to make rules and regulations * * * for the purpose of carrying out the provisions of this Act." [10] The Senate amendment to the House bill did not contain that rulemaking provision but did include a standard of legality—it condemned unfair methods of competition—to be enforced by the Commission through adjudicatory proceedings.[11]

Under the House bill, because the Commission's role was solely investigatory and it had no authority to proceed against any particular conduct, it may be said to have had no authority to adopt substantive rules. When Congress combined the investigatory function with the authority in the Senate bill to prohibit through adjudicatory proceedings the unfair methods of competition that the Act condemned, the reason for any limitation on the Commission's rule-making authority in the House bill no longer existed. There is no indication that when Congress decided to make unfair methods of competition illegal and to empower the Commission to proceed against substantive offenses, it intended to deny the agency the authority to make

[10] H.R. 15613, 63d Cong., 2d Sess.; 51 Cong. Rec. 9909–9910.
[11] 51 Cong. Rec. 13319.

that power more effective through using the rule-making authority to implement its adjudicatory power.[12] On the contrary, as the court of appeals concluded, "by reinserting a rule-making provision into the stronger commission bill all the conference did was reinstate the *principle* of the House bill as to rule-making—that is, permitting the commission to exercise authority roughly commensurate with its other powers, great or small" (Pet. App. 90; emphasis added).[13]

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[12] Petitioners' reliance upon internal congressional rules concerning the usual authority of a conference committee is misplaced, for such rules provide only a basis for a point of order, are waivable, and have no direct bearing on the validity or scope of legislation enacted pursuant to the actions of a conference committee. In any event, the contention rests upon an unduly narrow reading of the applicable rules, which require the conferees not to include in their reports matters not committed to them by either House, but do permit germane modifications of subjects in disagreement. See, *e.g.*, Senate Manual, p. 171. The inclusion of Section 6(g) with the scope described by the ruling of the court of appeals would be consistent with these requirements. The court's interpretation of the conference committee's version of the bill merely recognizes that the Act is an integrated whole defining a series of complementary powers.

[13] Petitioners misconstrue the comments offered during final debate in the House (Pet. 17) to suggest that Congress did not intend the Commission to exercise substantive rulemaking authority. The court of appeals closely scrutinized these and other post-conference debates (Pet. App. 95–101) and concluded that they do not demonstrate a clear intention to preclude substantive rulemaking. The remarks by Congressman Covington, a floor manager in the House, are not to the contrary. They concern the scope of review of Commission cease and desist orders as compared with "legislative" rules and orders issued by the Interstate Commerce Commission. As the court below recognized, "the power to frame substantive rules,

The fact that the rule-making authority is contained in Section 6 of the Act does not indicate that that authority was intended to be limited to procedural rules. Section 6 is captioned "Additional Powers of Commission," and does not specifically deal with or define the substantive offenses, as does Section 5. What Section 6 does is to give the Commission powers additional to those conferred in Section 5, such as the power to conduct various investigations, to compel and issue reports and, in Section 6(g), "to make rules and regulations for the purpose of carrying out the provisions of this act." One of the Commission's duties in "carrying out" the Act is to conduct adjudicatory proceedings under Section 5 to prohibit unfair methods of competition and unfair or deceptive acts or practices. If the Commission concludes, as it has here, that a rule particularizing certain conduct as violating Section 5 will aid it in "carrying out" the enforcement of that Section, such a rule is authorized by the broad language of Section 6(g).

4. The court below properly rejected petitioner's contentions (Pet. 12–13) that rulemaking is available

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in the context of the FTC, is hardly tantamount to the ICC's power to issue *orders* specifying the prices railroads must thereafter charge" (Pet. App. 96). Commission rules do not operate immediately on a designated class of parties and carry no legal effect unless the agency institutes enforcement proceedings.

Unlike the situation presented by rules adopted pursuant to a truly "legislative" rulemaking power as is exercised by the Interstate Commerce Commission and other agencies (see, p. 20, *infra*, n. 21), a person could not be penalized under the Federal Trade Commission Act, as enacted, until after (1) the person had violated Section 5, (2) the Commisison had issued a cease-and-desist order, (3) the person had then violated the order, (4) a court of appeals had then ordered the Commission's order to be enforced, and (5) the person had again violated the order, at which time contempt sanctions could be sought. 38 Stat. 720; cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 477–478. In other words, issuance of a rule by the Commission would have eased the Commission's burden only as to one stage of the enforcement process. Under subsequent amendments, however, penalties may now be imposed for a violation of a final Commission order under Section 5. 15 U.S.C. 45(*l*).

only to administrative agencies that regulate specific industries and that the Commission acts only in a prosecutorial capacity not a regulatory capacity. As indicated previously (pp. 13–14, *supra*), Congress specifically rejected the idea of creating a Commission whose sole function would be prosecutorial. Furthermore, the National Labor Relations Board, which exercises a similar prosecutorial role (29 U.S.C. 160), has been encouraged by this Court to use its general grant of rulemaking authority (29 U.S.C. 156) to issue substantive rules. See *National Labor Relations Board v. Wyman-Gordon Co., supra,* 394 U.S. at 764–765. Although the Commission, like the Board, does not exercise licensing and rate-making authority, the absence of such authority is certainly not a "sufficiently [compelling] distinction" to deny its use of rulemaking (Pet. App. 52).

The court below recognized that the Commission's responsibility to prevent unfair and deceptive practices is as potentially pervasive, in the sense of affecting commercial practices, as the regulatory authority granted other agencies.[14] Furthermore, the potential extent of the Commission's regulatory impact on business practices subject to the Act does not depend upon whether it elaborates the statutory standard by means of adjudication rather than rulemaking. (App. 53)

5. The Commission's failure to exercise substantive rulemaking authority until 1962 does not imply that

[14] The authority of the Securities and Exchange Commission similarly cuts across industry lines.

it does not have that authority. Powers granted by Congress do not atrophy by disuse. *United States* v. *Morton Salt Co., supra,* 338 U.S. at 647–648; *Federal Trade Commission* v. *Dean Foods Co.,* 384 U.S. 597, 610; *United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 590. But cf. *Federal Trade Commission* v. *Bunte Bros., Inc.,* 312 U.S. 349, 351–352. Nor can prior inconsistencies in the Commission's own view of its rulemaking authority displace the independent responsibility of the judiciary to construe the language employed by Congress in a manner consistent with the policy and language of the statute. Cf. *Zuber* v. *Allen,* 396 U.S. 168, 193.[15]

There is nothing to suggest that Congress has implicitly ratified the Commission's prior view of the

[15] Although courts often accord "great weight" to an agency's construction of legislation it administers (*Udall* v. *Tallman,* 380 U.S. 1, 16), the argument for judicial deference is less compelling where, as here, the agency was not involved in the drafting of the legislation (see *Zuber* v. *Allen, supra,* 396 U.S. at 192); the agency's construction has resulted in inaction as opposed to affirmative action, the former having possible alternative justifications and the latter requiring an unequivocal assertion of agency position (cf. *United States* v. *Morton Salt Co., supra,* 338 U.S. at 647–648; *Federal Trade Commission* v. *Bunte Bros., Inc., supra,* 312 U.S. at 358–359 (Douglas, J., dissenting); and the question does not require the agency's particular expertise. As the court below recognized, "[h]ere, the question is simply one of statutory interpretation concerning the procedures and setting in which the Commission may elaborate the statutory standard. Since this sort of question calls largely for the exercise of historical analysis and logical and analogical reasoning, it is the everyday staple of judges as well as agencies" (Pet. App. 70–71). Furthermore, the court's decision conforms to the Commission's own view of its rulemaking authority.

limited scope of its rulemaking authority. Cf. *Power Reactor Dev. Co.* v. *International Union of Elec. Workers,* 367 U.S. 396, 409. Indeed, when Congress expanded the Commission's regulatory authority to include such areas as products labeling,[16] and flammable fabrics,[17] it specifically included rulemaking among the Commission's responsibilities. Far from representing a *de facto* ratification of the view that the Commission's authority under Section 6(g) is limited, these enactments indicate a purpose to remove any possible basis for dispute over the existence of the power.[18] The legislative history of the Fair Packaging and Labeling Act of 1967, cited by the court below (Pet. App. 74–75), supports the view that such grants of rulemaking authority were largely motivated by Congress' desire to eliminate doubts.[19] Moreover, in each such enactment the resulting rules were given independent legal significance in that the laws required compliance with both the statute and the regulations.

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[16] Wool Products Labeling Act of 1939, 15 U.S.C. 68a, 68d(a); Fur Products Labeling Act, 15 U.S.C. 69a (a), (b), (c), 69f(b); Textile Fiber Products Identification Act, 15 U.S.C. 70a (a), (b), (c), 70e(c); Fair Packaging and Labeling Act, 15 U.S.C. 1454(a), 1455(b), 1456(b).

[17] Flammable Fabrics Act, 15 U.S.C. 1194(c).

[18] "Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." *Wong Yang Sung* v. *McGrath,* 339 U.S. 33. In *Federal Trade Commission* v. *Dean Foods Co., supra,* 384 U.S. at 610, this Court refused to infer that, by seeking ratification from Congress, the agency admitted acting upon a wrong construction of the Act.

[19] See H. Rep. No. 2076, 89th Cong., 2d Sess., p. 22; S. Rep. No. 1186, 89th Cong., 2d Sess., pp. 17, 40.

6. This Court is also urged to review the decision below to eliminate Congressional "uncertainty" in this area (Pet. 23). The question in this case, however, is "not what the [Commission] thinks it should do but what Congress has said it can do." *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322. As petitioners recognize (Pet. 22), all of the bills introduced in the past two years giving the Commission specific authority to promulgate substantive rules reflect a recognition by their sponsors that the Commission should have all the tools necessary to prevent unfair and deceptive practices, including substantive rulemaking authority. Congressional uncertainty focuses on the scope of such rulemaking authority and the procedures to be employed. Should Congress be dissatisfied with the scope of the Commission's powers under the Act as construed by the court of appeals, it can amend the Act to alter the Commission's authority. Indeed, it recently passed up an opportunity to do so.[20].

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[20] Subsequent to the decision below, Congress specifically amended Sections 5 and 6 of the Federal Trade Commission Act in several respects, but made no changes affecting in any way the scope of Section 6(g) as construed by the court of appeals. (Trans-Alaska Pipeline Authorization Act, 87 Stat. 591–592). This failure to act is particularly significant because the provisions of the Pipeline Act relating to the Commission paralleled similar provisions in a bill previously passed by the Senate (S. 356, 93d Cong., 1st Sess.; 119 Cong. Rec. S. 16439, (daily ed., Sep. 12, 1973); see 119 Cong. Rec. S. 12967–12968 (daily ed., July 10, 1973) which, when introduced, had contained provisions giving the Commission explicit powers to adopt substantive rules. In discussing the deletion of those provisions from the bill as reported to the Senate, the Commerce Committee stated that the deletion had been made in anticipa-

Petitioners also claim that Congress has "superseded" three of the Commission's twenty trade regulation rules (Pet. 21). This contention has no bearing on the question presented here. Trade regulation rules merely narrow the scope of inquiry in Commission enforcement proceedings and provide guidance to the business community. Even if there were no question concerning the Commission's authority to issue such rules, Congress might still choose to add to the significance of the rules by providing civil or criminal penalties for failure to comply with the rules themselves, as opposed to the statute.[21] It might also incorporate the substance of a rule in a statute, thereby insuring that the position reflected in the rule would not be administratively altered and possibly providing remedies which the Commission could not readily have provided.[22]

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tion of a favorable ruling by the court of appeals in the instant case (S. Rep. No. 93–151, 93d Cong., 1st Sess., p. 32), and later, in the debates, Senator Magnuson, chairman of the committee, expressed satisfaction that the court of appeals had "now held that the Commission already possesses ample, unfettered rulemaking powers." 119 Cong. Rec. S. 16429 (daily ed., Sep. 12, 1973).

[21] See, *e.g.*, 15 U.S.C. 77x, 77yyy, 78ff, 79z–3, 80a–48, 80b–17; 16 U.S.C. 825o(b); 47 U.S.C. 502; 49 U.S.C. 1471–1472.

[22] This is precisely the effect of Congressional action cited by petitioners. For example, under the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended (84 Stat. 87, 15 U.S.C. 1331, *et seq.*) Congress provided that a violation would constitute a misdemeanor subjecting the offender to a fine of not more than $10,000. 15 U.S.C. 1336(c)) provides that "[n]othing in this act shall be construed to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any

15 U.S.C. 1338 However, Section 7(c) of that Act.

7. In the present posture of this litigation, review at this time would be premature because several issues remain to be resolved on remand to the district court. Petitioners have challenged not only the Commission's statutory authority to promulgate the Octane Posting Rule, but also the procedures employed in adopting it and the factual basis for it.[23] If they should ultimately prevail on either of those contentions, there would be no need to decide whether the Commission has that authority.

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cigarette advertisement." In the Trust in Lending Act (15 U.S.C. 1643), Congress added to the substance of the Commission's rule a provision limiting liability for unauthorized use of a credit card, and in the Postal Reorganization Act (39 U.S.C. 3009), Congress added to the Commission's proposed rule a prohibition against the mailing of bills for unordered merchandise.

[23] The district court must also resolve petitioners' contentions that the Rule represents an unconstitutional usurpation of Congress' legislative power, and that the Rule is arbitrary, capricious and an abuse of discretion. No adverse consequences result from deferral of review by this Court of the validity of the Rule in view of the fact that no effective date for the Rule has been set. See p. 4, *supra*, n. 2. Moreover, on August 17, 1973, the Cost of Living Council issued a regulation respecting octane posting (38 Fed. Reg. 22536, 22538; 6 C.F.R. 150.351, 150.352), which became effective August 19, 1973.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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